1253

SUPREME COURT OF THE UNITED STATES.

No. 92.

JOHN L. H. McCRACKEN, PLAINTIFF,

vs.

CHARLES HAYWARD.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT UNITED STATES FOR THE DISTRICT OF ILLINOIS.

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J. & G. S. GIDEON, printers.

Pleas before the honorable the circuit court of the United States of America for the district of Illinois, at the June term, one thousand eight hundred and forty-three, of said court, and on the ninth day of said term, being the thirteenth day of June, in the year aforesaid.

Present: The Hon. John McLean, presiding judge; the Hon. Nathaniel Pope, judge.

JOHN L. H. MCCRACKEN vs. CHARLES HAYWARD. } Motion, &c.

This day came the plaintiff, by his counsel, and having previously filed his written motion as follows, to wit:

"JOHN L. H. MCCRACKEN vs. CHARLES HAYWARD. } Motion.

1. The plaintiff, by Arnold, *by* his attorney, comes and moves the court to set aside the return to the pluries execution issued in this cause, dated 16th day of May, 1842, under which the property levied upon was appraised, and not sold, because no one would bid two-thirds of appraised value.

2. That the court direct the marshal to sell said property to the highest bidder, without regard to the valuation already made, and without having it valued again.

3. That the marshal proceed to sell said property without regard to the provisions of the laws regulating the sale of property, passed since the rendition of the judgment, but that he execute the process of the court, enforcing the judgment according to the remedy existing at the time of the rendition of the judgment, and the making of the contract between the parties.

4. That the marshal be directed to proceed and sell the property levied upon, without regard to the provisions of the act of February, 1841, of the Legislature of Illinois, and of January, 1843, regulating the sale of property, above referred to."

The following is the affidavit upon which said motion is founded, to wit:

"JOHN L. H. MCCRACKEN vs. CHARLES HAYWARD.

"STATE OF ILLINOIS, *ss:*

"Isaac N. Arnold, being duly sworn, saith, that a judgment was rendered in this cause on or about the second day of June, A. D. 1840, in favor of the plaintiff, and against the defendant, for the

sum [of] $3,986 67 and costs, as will more fully appear by the record, to which reference is had for greater certainty. That on or about the 16th day of May, 1842, a pluries fieri facias was issued out of the clerk's office of this court, directed to the marshal of this district, to collect the amount of said judgment; under which, on or about the 21st day of May, 1842, the marshal levied upon and seized a large amount of real estate, as will more fully appear by the return to said fieri facias on file in this court. The property was advertised for sale in August thereafter.

That the marshal procured the same to be appraised by three householders, according to the act of the State of Illinois, passed February 27, 1841, regulating the sale of property on execution, and the rule of this court, adopted in June thereafter, to which said act and rule reference is had. On the day of sale, no person bid two-thirds the amount of such sale, and it was thereupon not sold.

On or about the 7th day of March last, plaintiff sued out a venditioni exponas to sell the property levied upon as aforesaid. On or about the 20th of May, the plaintiff, by this deponent, his attorney, served a written notice on the deputy marshal, in whose hands was the said process, directing him not to have the property valued, and to sell the same to the highest bidder, regardless of the statute of Illinois above mentioned, and the rule of this court, and regardless of the provisions of the act regulating the sale of property on execution, passed at the late session of the Legislature of Illinois, which directions, the marshal, by his deputy, refused to follow, as will appear by the written notice and answer herewith filed; and this affiant, for greater certainty, and as a part of the case on which the foregoing motion is founded, refers to the judgment and execution issued in this cause, the various returns thereon, the statutes of the State of Illinois when referred to, and the rule of this court, and the papers herewith filed, and further saith not.

"J. N. ARNOLD."

"Sworn to and subscribed, in open court, this 6th day of June, 1843. JAMES F. OWINGS, *Clerk.*"

And it appearing to the court that judgment was rendered the second day of June, A. D. 1840, as follows, to wit:

"JOHN L. M. MCCRACKEN vs. CHARLES HAYWARD. } In assumpsit.

"And now, at this day, comes the said plaintiff, by Arnold and Ogden, his attorneys, and the said defendant having been duly served with process and failed to plead, according to a rule heretofore entered against him, and being thrice solemnly called, comes not, but makes default; but, because it is unknown what damage the plaintiff has sustained, by reason of the premises, let a jury be called; whereupon came the jurors of a jury, to wit:

John S. Bradford,	Benjamin Bond,
Levi Young,	George Davis,
Levi Sharp,	Richard Edmonson,
Andrew Bourland,	Charles G. Thomas,
John Brown,	Henry Scott, and
Benjamin Allen,	James Webb,

who, being duly elected, tried, and sworn, well and truly to assess the damages sustained by the plaintiff in the premises, and having heard the evidence offered by the said plaintiff, upon their oaths say, that said plaintiff has sustained damages, by reason of the non-performance of the promises and undertakings in the said plaintiff's declaration mentioned, to three thousand nine hundred and eighty-five dollars and sixty-seven cents. It is therefore considered and ordered by the court, that the said plaintiff recover of and from the said defendant, his damages aforesaid, by the jury aforesaid assessed, together with his costs and charges in and about his suit in his behalf expended, and that he have execution therefor, &c."

And that on the sixteenth day of May, A. D. 1842, a pluries execution issued on said judgment as follows, to wit:

"UNITED STATES OF AMERICA, *District of Illinois, ss:*

"United States of America to the marshal of the district of Illinois, greeting:

"We again command you, that of the goods and chattels, lands and tenements, of Charles Hayward, in your district, you cause to be made four thousand and twelve dollars and sixty and one-half cents, which John L. M. McCracken, lately in our circuit court of the United States for the district of Illinois, before the judges thereof, at Springfield, in the district aforesaid, recovered against him for damages which he had sustained, as well by occasion of the non-performance of certain promises and undertakings, as for his costs and charges by him about his suit in this behalf expended, whereof the said defendant is convicted, as appears to us of record. And have you that money at the clerk's office of our said court, in ninety days from the date hereof, to render to the said plaintiff for his damages aforesaid, and this writ.

"Witness, the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Spring-
[SEAL.] field, in the district aforesaid, this 16th day of May, in the year of our Lord eighteen hundred and forty-two, and of the independence the sixty-sixth year.

"JAMES F. OWINGS, *Clerk.*"

The following is a copy of the return made upon said execution, to wit:

"By virtue of this execution I have levied upon property of the within named defendant, (a schedule of which is hereto annexed,) this 21st day of May, 1842.

WM. PRENTISS, *Marshal.*
By W. P. WHITTLE, *Deputy.*"

The following is a copy of the schedule of property annexed to said return, to wit:

"Lots 2 and 3, in block 2; lots 3, 7 8, and 9, in block 3; lot 5, in block 4; lots 1 and 3, in block 6; lot 14, in block 9; lot 1, in block 10; lots 1, 3, 7, 8, 11, and 15, in block (11;) lot 1, in block 2; lot 17, in block 14; lots 1, 13, and 17, in block 15; lots 9 and 15, in block 16; lots 1, 7, and 8, in block 17; lot 11, in block 17, on which is erected a one story brick house; lot 4, in block 18; lot 5, in block 18, on which is erected a one story wood house; lots 3, 7, 11, 15, and 16, in block 19—two story wood house on lot 3, and a one story brick house on lot 15, in block 19—also, a two story brick house on lot 16, in block 19; lots 13, 14, and 16, in block 20; lot 5, in block 20, on which is erected two one story wood houses; lots 3, 6, 7, 9, 11, 12, and 15, in block 21; lots 8, 9, 10, 11, 12, and 15, in block 22; lots 2 and 3, in block 24; lot 1, in block 24; lots 1, 3, 4, 7, 12, 13, and 17, in block 25; lots 1, 5, 13, 17, in block 26; lots 1, 3, 9, 11, 15, in block 27; lot 7, in block 27, on which is erected a stable; lots 1, 2, 5, 9, 3, in block 28; lots 3, 7, 12, 13, in block 29; lots 1, 9, 11, and 15, in block 30; lots 7, 13, 16, and 17, in block 31; lots 5, 15, and 17, in block 32; lot 1, in block 33; lots 5 and 9, in block 35; lots 6 and 1, in block 36; lots 2 and 3, in block 37; lots 1 and 5, in block 38. Also, a brick house on lot 7, in block 19, all in the town of Ottawa Centre, adjoining Ottawa, Lasalle county, Illinois. Also, N. W. $\frac{1}{4}$ section 13, township 15 N., range 8 E., 4th principal meridian; S. E. $\frac{1}{4}$ section 24, township 15 N., range 8 E. of same meridian; W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 24, township 16 N., range 8 E. of same meridian; E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 24, township 16 N., range 8 E. of same meridian; E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 25, township 16 N., range 8 E. of same meridian; W. $\frac{1}{2}$ S. W. $\frac{1}{4}$ section 23, township 16 N., range 8 E. of same meridian; N. E. $\frac{1}{4}$ section 5, township 15 N., range 9 E. of same meridian; E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ section 5, township 15 N., range 9 E. of same meridian; E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 6, township 15 N., range 9 E. of same meridian; N. W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 6, township 15 N., range 9 E. of same meridian; W. $\frac{1}{2}$ S. E $\frac{1}{4}$, and S. 30 acres of W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 23, town. 31 N., range 3 E., 3d principal meridian; $\frac{1}{4}$ W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ of section 6, town. 38 N., range 13 E., 3d principal meridian. Also, lot 6, in block 15; lot 6, in block 18; and E. $\frac{1}{2}$ of W. $\frac{1}{2}$ of lot 2, in block 19, in the town of Perry, county of Lasalle, and State of Illinois. Also, the E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ section 36, township 34 N., range 3 E. of the 3d principal meridian."

Which said lands, after having been so levied upon, were duly appraised in conformity with the law of the State of Illinois, and

the rule of court adopting the same, hereinafter recited: that on the 7th day of March, A. D. 1843, a venditioni exponas was duly issued in usual form to the marshal, to sell the property levied upon; that the plaintiff served a copy of written instruction on the marshal, as follows:

"JOHN L. H. McCRACKEN
vs.
CHARLES HAYWARD.

"To William Prentiss, U. S. marshal for district of Illinois.

"SIR: You are hereby directed and instructed to proceed to sell the property levied upon under the execution in this cause, and described in the venditioni exponas, without having the same valued by three householders, in accordance with any law of the State of Illinois, and without requiring two-thirds of the valuation to be bid therefor, but you will proceed to sell the same to the highest bidder for cash, regardless of any and all provisions of the laws of the State of Illinois, commonly known as valuation or stay laws.

JOHN L. H. McCRACKEN,
By ARNOLD & OGDEN, *his Att'ys.*

May, 1843."

Which the marshal declined to observe in writing, as follows, to wit:

"To Messrs. Arnold & Ogden, attorneys for John L. H. McCracken.

"GENTLEMEN: In reply to your note of this morning, requiring me to sell the property now advertised for sale in the case of John L. H. McCracken *vs.* Charles Hayward, without having the same appraised and sold subject to the two-thirds law of the State of Illinois, I have only to say, that I conceive it to be my duty to be governed by the rule of court in regard to selling property upon execution, &c.

Very respectfully, your obedient servant,
WM. PRENTISS, *U. S. Marshal.*"

And on the third day of June the plaintiff served notice of said motion on the defendant, which appears by following notice and admission, to wit:

"UNITED STATES CIRCUIT COURT, *District of Illinois.*

"JOHN L. H. McCRACKEN
vs.
CHARLES HAYWOOD.

"CHARLES HAYWOOD, SIR: Please to take notice, that on Monday, the 5th of June inst., or as soon thereafter as counsel can be heard, I shall move the court, at the court-house in Springfield, for an order on the marshal of this district, to sell the property levied on

under the execution in this cause to the highest bidder, without having the same valued or appraised, and regardless of the provisions of the valuation or two-thirds law of this State.

Yrs., &c.

J. N. ARNOLD, *Att. for Plff.*

June 1, 1843."

On which said notice is the following written endorsement, viz:

"Received a copy of the within, this 3d June, 1843.

J. V. A. HOES, *Att. for Deft.*"

The following are the acts of the Legislature of Illinois, and rule adopted by this court, referred to in the motion, viz:

"An act regulating the sale of property.

"Sec. 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That when any execution shall be issued out of any of the courts of this State, whether of record or not, and shall be levied on any real or personal property, or both, it shall be the duty of the officer levying such execution, to summon three householders of the proper county, one of whom shall be chosen by such officer, one by the plaintiff, and one by the defendant in the execution; or, in default of the parties making such choice, the officer shall choose for them: which householders, after being duly sworn by such officer so to do, shall fairly and impartially value the property upon which such execution is levied, having reference to its cash value, and they shall endorse the valuation thereof upon the execution, or upon a piece of paper thereunto attached, signed by them; and when such property shall be offered for sale, it shall not be struck off unless two-thirds of the amount of such valuation shall be bid therefor: Provided, always, that the plaintiff in any execution issued from any court of record of this State, may elect on what property he will have the same levied, except the land on which the defendant resides, and his personal property, which shall be last taken in execution. And in all other executions issued from any of the courts of this State not being courts of record, the plaintiff in execution may elect on what personal property he will have the same levied; excepting and reserving, however, to the defendant in execution, in all cases, such an amount and quantity of property as is now exempt from execution by the laws of this State: And provided, further, that all sales of mortgaged property shall be made according to the provisions of this act, whether the foreclosure of said mortgage be by judgment at law, or decree in chancery. The provisions of this act shall extend to judgments rendered prior to the first day of May, eighteen hundred and forty-one, and to all judgments that may be rendered on any contract or cause of action accruing prior to the first day of May, eighteen hundred and forty-one, and not to any other judgments than as before specified.

Sec. 2. When any property shall be levied on and appraised in the manner required by this act, and the same shall be susceptible of a division, no greater quantity thereof than will be sufficient to pay the amount of the execution or executions thereon levied, together with the proper costs at two-thirds of the valuation thereof, shall be offered for sale by the officer in whose hands such execution or executions may have been placed for collection.

Sec. 3. This act shall be in force from and after its passage, and the Secretary of State is hereby required to have a thousand copies thereof printed immediately after its approval, and transmit them to the clerks of the county commissioners' courts of the several counties in this State for distribution among the proper officers thereof. Approved February 27, 1841."

The following is a copy of the rule of court passed June 19, 1841, viz: "When the marshal shall levy an execution upon real estate he shall have it appraised and sold under the provisions of the law of this State, entitled 'an act regulating the sale of property,' approved 27th February, 1841, if the case come within the provisions of that law; and any two of the three householders selected under the law agreeing, may make the valuation of the premises required."

And now, at this term of the court, the said motion above set forth came on to be heard, and, after argument of counsel, the judges being opposed in opinion on the following points, to wit:

1st. Whether the said motion shall be granted in manner and form as the same is asked or refused, or any part thereof.

2d. Whether the return of the marshal on the execution above set forth, dated May 16, 1842, under which the property was appraised and not sold, because two-thirds of appraised value was not bid therefor, shall or shall not be set aside as insufficient.

3d. Whether the court shall or shall not make an order directing the marshal to sell the property levied on in the usual mode at public auction to the highest bidder, without having the same valued by three householders, and without regard to valuation which has been made, and without requiring two-thirds of said valuation to be bid therefor.

4th. Whether the court shall or shall not direct the marshal to proceed and sell the property levied upon without regard to the provisions of the act of February 27, 1841, of the Legislature of Illinois, and the rule adopting said law at the June term, 1841.

5th. Whether the court will or will not direct the enforcement of said judgment according to the laws regulating the remedy when said judgment was entered and the contract made.

On motion of the plaintiff it is ordered that this cause, with the above points, be certified to the Supreme Court, in pursuance of the act of Congress;—and this cause is continued to the next term of this court.

I, James F. Owings, clerk of the circuit court of the United States for the district of Illinois, do certify that the foregoing are true and correct copies of *the motion*, and *and* affidavit in support of the same, to require the marshal to sell the property levied on in a certain writ of execution issued from the said circuit court in a judgment therein rendered, entitled John L. H McCracken vs. Charles Hayward, the judgment and execution as recorded and rendered in said case; the marshal's return on said execution; the instructions of plaintiff's attorneys, to sell without a reference to the statute of Illinois regulating the sale of property; the written refusal of the marshal so to sell; the notice of motion and acknowledgment of the service of the same by defendant's attorney; the act of the Legislature of Illinois entitled "An act regulating the sale of property, approved, Feb. 27, 1841," and the rule of the court adopting the said act as entered June 19, 1841; together with the points ordered to be certified to the Supreme Court, as the same appear on file or of record, except as to the act of the Illinois legislature, which is a true copy of the same as it appears in the accredited statutes of said State.

In testimony whereof I have hereunto subscribed my name
[SEAL.] and affixed the seal of said circuit court, this 20th day of June, A. D. 1843, and of our independence the 67th year.

JAMES F. OWINGS,
Clerk Circuit Court U. S., dist. Illinois.

Filed,